



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **FRL-9919-53-OAR**

#### **California State Nonroad Engine Pollution Control Standards; Diesel Engines on Commercial Harbor Craft; Request for Within-the-Scope and Full Authorization; Opportunity for Public Hearing and Comment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The California Air Resources Board (CARB) has notified the Environmental Protection Agency (EPA) that it has adopted amendments to its Commercial Harbor Craft regulation (CHC amendments). By letter dated May 28, 2014, CARB asked that EPA authorize these amendments pursuant to section 209(e) of the Clean Air Act (CAA or Act). CARB seeks confirmation that certain of the amendments are within the scope of a prior authorization issued by EPA, and that certain of the amendments require and merit a full authorization. This notice announces that EPA has tentatively scheduled a public hearing to consider California's request for authorization of the CHC amendments, and that EPA is now accepting written comment on the request.

**DATES:** EPA has tentatively scheduled a public hearing concerning CARB's request on January 14, 2015, at 10 a.m. ET. EPA will hold a hearing only if any party notifies EPA by December 15, 2014, to express interest in presenting the Agency with oral testimony. Parties that wish to present oral testimony at the public hearing should provide written notice to David Dickinson at the email address noted below. If EPA receives a request for a public hearing, that hearing will be held at the William Jefferson Clinton Building (North), Room 5530, 1200 Pennsylvania Ave, NW, Washington, DC 20460. If EPA does

not receive a request for a public hearing, then EPA will not hold a hearing, and will instead consider CARB's request based on written submissions to the docket. Any party may submit written comments until February 16, 2015.

Any person who wishes to know whether a hearing will be held may call David Dickinson at (202) 343-9256 on or after December 17, 2014.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2014-0534, by one of the following methods: Online at <http://www.regulations.gov>: Follow the Online Instructions for Submitting Comments.

- Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- Fax: (202) 566-9744.
- Mail: Air and Radiation Docket, Docket ID No. EPA-HQ-OAR-2014-0534, U.S. Environmental Protection Agency, Mail code: 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Online Instructions for Submitting Comments:* Direct your comments to Docket ID No. EPA-HQ-OAR-2014-0534. EPA's policy is that all comments we receive will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information

that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or email. The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will automatically be captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

EPA will make available for public inspection materials submitted by CARB, written comments received from any interested parties, and any testimony given at the public hearing. Materials relevant to this proceeding are contained in the Air and Radiation Docket and Information Center, maintained in Docket ID No. EPA-HQ-OAR-2014-0534. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday

through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The electronic mail (email) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the <http://www.regulations.gov> website, enter, in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality also maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver and authorization *Federal Register* notices. The page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

**FOR FURTHER INFORMATION CONTACT:** David Dickinson, Attorney-Advisor, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405A), NW, Washington, DC 20460. Telephone: (202) 343-9256. Fax: (202)343-2804. Email: [Dickinson.david@epa.gov](mailto:Dickinson.david@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. California's CHC Regulation, Prior Authorization, Within-the-Scope Request, and New Request**

CARB formally approved its original CHC regulation on November 15, 2007. The original CHC regulation established in-use emission limits for in-use ferries,

excursion vessels, tugboats, and towboats equipped with federal Tier 0 and Tier 1 propulsion and auxiliary marine engines. Owners and operators of these vessels were required to upgrade the engines to meet emission limits equal to or cleaner than federal Tier 2 or Tier 3 marine engine certification standards, according to a compliance schedule that was also set forth in the regulation. The compliance schedule was based on the model year of the original engine, its hours of operation, and the vessel's home port location. On December 5, 2011, EPA granted California an authorization for the original CHC regulation.<sup>1</sup>

CARB subsequently adopted the CHC amendments on June 24, 2010.<sup>2</sup> The CHC amendments are codified at title 17, California Code of Regulations (CCR), section 93118.5.<sup>3</sup> By letter dated May 28, 2014, CARB submitted a request to EPA pursuant to section 209(e) of the CAA, regarding authorization of its CHC amendments.<sup>4</sup> The CHC amendments set forth a variety of in-use requirements, including: extending the applicability of the CHC regulations to in-use crew and supply, barge, and dredge vessels that are equipped with Tier 0 and Tier 1 propulsion and auxiliary marine engines that operate within the Regulated California Waters;<sup>5</sup> deleting certain exemptions of CHC engines registered in CARB's portable equipment registration regulation or permitted by local air pollution districts; defining swing engines and clarifying certain in-use engine requirements; adding replacement engine exemptions; expanding compliance extension

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<sup>1</sup> 76 FR 77521 (December 5, 2011).

<sup>2</sup> CARB, "Resolution 10-26," June 24, 2010.<sup>3</sup> The corresponding low-sulfur fuel requirements for commercial harbor craft are at title 13, CCR section 2299.5.

<sup>3</sup> The corresponding low-sulfur fuel requirements for commercial harbor craft are at title 13, CCR section 2299.5.

<sup>4</sup> California Air Resources Board ("CARB"), "Request for Authorization," May 28, 2014.

<sup>5</sup> Regulated California Waters include all California inland waters, all California estuarine waters, and all waters within a zone 24 nautical miles seaward of the California coastline, except for specified areas along the Southern California coastline. Title 17 CCR 93118.5(d)(68).

options; and, allowing continued use of existing engines in certain circumstances.

CARB's CHC amendments that are applicable to both new and in-use engines allow the use of EPA or CARB certified off-road (also known as nonroad)<sup>6</sup> compression-ignition (CI) engines to comply with the new and in-use requirements for propulsion and/or auxiliary engines, and set forth a deadline for owners and operators to submit "alternative control of emission plans."<sup>7</sup> CARB seeks a full authorization for those amendments that establish emission standards, other requirements relating to the control of emissions, and accompanying enforcement provisions applicable to in-use diesel engines that are used on crew and supply, barge, and dredge vessels. CARB also seeks EPA's confirmation that the remaining CHC amendments (including those that clarify existing regulations or expand compliance flexibilities) fall within the scope of EPA's December 2011 authorization, pursuant to section 209(e) of the CAA.<sup>8</sup>

## **II. Clean Air Act Nonroad Engine and Vehicle Authorizations**

Section 209(e)(1) of the CAA prohibits states and local governments from adopting or attempting to enforce any standard or requirement relating to the control of emissions from new nonroad vehicles or engines. The Act also preempts states from adopting and enforcing standards and other requirements related to the control of emissions from non-new nonroad engines or vehicles. Section 209(e)(2), however, requires the Administrator, after notice and opportunity for public hearing, to authorize

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<sup>6</sup> The federal term "nonroad" and the California term "off-road" are used interchangeably.

<sup>7</sup> CARB's CHC amendments now allow diesel engines in CHC vessels to be fueled with EPA on-road or off-road diesel fuel if a CHC is traveling from a port located outside of California which does not have CARB diesel fuel or specified alternative diesel fuels, and provided the CHC owner or operator retains records documenting the fuel purchase, location and name of the port located outside of California. CARB notes that both the original regulation (that required all CHC vessels only be fueled with CARB diesel fuel or specified alternative fuels) and the amended regulation are in-use operational controls of nonroad engines and are not preempted by section 209(e) of the Act.

<sup>8</sup> See CARB's authorization support document (Docket EPA-HQ-OAR-2014-0534-0003) at p. 8.

California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. However, EPA shall not grant such authorization if it finds that (1) the determination of California is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with [CAA section 209].<sup>9</sup> In addition, other states with air quality attainment plans may adopt and enforce such regulations if the standards, and implementation and enforcement procedures, are identical to California's standards. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2), that EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards.<sup>10</sup> EPA revised these regulations in 1997.<sup>11</sup> As stated in the preamble to the 1994 rule, EPA has historically

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<sup>9</sup> EPA's review of California regulations under section 209 is not a broad review of the reasonableness of the regulations or its compatibility with all other laws. Sections 209(b) and 209(e) of the CAA limit EPA's authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria. In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination. See *Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462–63, 466–67 (D.C. Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114–20 (D.C. Cir. 1979). See also 78 FR 58090, 58120 (September 20, 2013).

<sup>10</sup> 59 FR 36969 (July 20, 1994).

<sup>11</sup> 62 FR 67733 (December 30, 1997). The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California's determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).<sup>12</sup>

In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.<sup>13</sup>

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(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

<sup>12</sup> 59 FR 36969 (July 20, 1994).

<sup>13</sup> *Id.* See also 78 FR 58090, 58092 (September 20, 2013).



If California amends regulations that EPA has already authorized, California can seek EPA confirmation that the amendments are within the scope of the previous authorization. A within-the-scope confirmation, without a full authorization review, is permissible if three conditions are met.<sup>14</sup> First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

### **III. EPA's Request for Comments**

As stated above, EPA is offering the opportunity for a public hearing, and is requesting written comment on issues relevant to a within-the-scope analysis pertaining to CARB's amendments. Specifically, we request comment on whether California's CHC amendments: (a) undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards; (b) affect the consistency of California's requirements with section 209 of the Act; or (c) raise any other new issues affecting EPA's previous waiver or authorization determinations.

Should any party believe that the amendments noted within CARB's request are not within the scope of the previous authorization, EPA also requests comment on whether the CARB CHC amendments meet the criteria for a full authorization. Specifically, we request comment on: (a) whether CARB's determination that its standards, in the aggregate, are at least as protective of public health and welfare as

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<sup>14</sup> See 78 FR 38970, 38972 (June 28, 2013).

applicable federal standards is arbitrary and capricious, (b) whether California needs such standards to meet compelling and extraordinary conditions, and (c) whether California's standards and accompanying enforcement procedures are consistent with section 209 of the Act.

EPA also requests comment on whether the CHC amendments, for which CARB seeks a full authorization, meet the criteria of section 209(e) for a full authorization.

#### **IV. Procedures for Public Participation**

If a hearing is held, the Agency will make a verbatim record of the proceedings. Interested parties may arrange with the reporter at the hearing to obtain a copy of the transcript at their own expense. Regardless of whether a public hearing is held, EPA will keep the record open until February 16, 2015. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record from the public hearing (if a hearing is conducted), all relevant written submissions, and other information that she deems pertinent. All information will be available for inspection at the EPA Air Docket No. EPA-HQ-OAR-2014-0534.

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest extent possible and label it as "Confidential Business Information" ("CBI"). If a person making comments wants EPA to base its decision on a submission labeled as CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted to the public docket. To ensure that proprietary information is not inadvertently placed in the public docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. Information covered by a claim of

confidentiality will be disclosed by EPA only to the extent allowed, and according to the procedures set forth in 40 CFR Part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

Dated: November 12, 2014.

Christopher Grundle, Director,  
Office of Transportation and Air Quality,  
Office of Air and Radiation.

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